CHAN CHOON MING

v.

LOW POH CHOON & 4 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' V.C. GEORGE J
[ORIGINATING SUMMONS NO. D6-24-58-92]
17 MARCH 1994

***COMPANY LAW**: Article 90 resolutions passed by a majority of directors - Appointment of new directors - Transfer of shares - Resolutions not brought to plaintiff's attention - EGM convened to remove plaintiff from board of directors - Validity of Article 90 resolutions - Validity of appointment of new directors - Consideration of Articles 68, 73, 79, 88, 89 and s. 127 of the Companies Act 1965.*

By several Art. 90 resolutions signed by a majority of the directors of the fourth defendant company, the second and third defendants were appointed as directors of the company and a certain number of shares were transferred in their favour from the first defendant. Subsequently, an extraordinary general meeting was convened where another Art. 90 resolution was passed by the majority of the directors to remove the plaintiff from the board of directors. Of the several resolutions passed; only the last had been circulated to or otherwise brought to the plaintiff's attention or knowledge prior to the resolutions being made.

The issue was whether the resolutions passed were valid.

Held:

[1] Article 90 which is one of the articles under the general heading "Proceedings of the directors", has to be read in the context of the principle that the powers conferred upon directors are conferred on them collectively as a board. In that context it is inconceivable that notice of an intended resolution of the directors need not be given to every member of the board. If upon the majority signing such a resolution it is not necessary to pass it on to the others who are present in the country there could be a situation of a company being managed, not by the board, but by a clique, no doubt consisting of the majority of the board, using Art. 90 type resolutions and leaving the minority in the dark as to what is happening on and to the company. It cannot then be said that the business of the company is managed by the directors (as provided by Art. 73).

[2] To make Art. 73 meaningful and to give effect to the collective responsibility of the board, although all that is required for an effective Art. 90 resolution is that it be signed by the majority, it must be taken as implied that every member of the board has to have the resolution circulated to him or her before it can be accepted as a director's resolution. Therefore each of the said resolutions, notice of which was not given to the plaintiff is ineffective.

[3] Article 89 and s. 127 of the Companies Act 1965 have no relevance in respect of the ineffective Art. 90 resolutions in that as the resolutions were ineffective the purported appointment of the second and third defendants as directors were no appointments. This is not a case of some defect in their appointments. In effect there was no appointment *ab initio*.

[Appointment of directors declared null and void. Consequential and other orders sought granted]

Cases referred to:
Re Portuguese Copper Mines [1889] 42 Ch. Div. 160 ***(refd)***
Young v. Ladies Imperial Club [1920] 2 KB 523 ***(refd)***
Swiss Screens (Australia) Pty. Ltd. v. Borgess [1987] 11 ACLR 756, 758 ***(refd)***
Pulbrook v. Richmond Consolidated Mining Company [1878] 9 Ch. D. 610, 612 ***(foll)***
Morris v. Kanssen & Ors. [1946] 1 All ER 586, 590 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 127

For the plaintiff - H.K. Teh; M/s H.K. Teh & Associates
For the first to fourth defendants - F.T. Yip; M/s Yip & Co.
For the fifth defendant - Rajkumari; M/s Noor, Tung & Kumar

JUDGMENT

V.C. George J:

The validity of the appointment of the second and third defendants as directors of the fourth defendant is challenged as is the validity of board decisions taken by the board with the second and third defendants as members.

Article 73 of the Articles of Association of the company is a vesting provision and *inter alia* provides that the business of the company shall be managed by the directors.

Article 68 provides that the directors shall have the power to appoint directors to fill a casual vacancy or as additional directors.

Article 79 provides that not less than 7 days notice of a board meeting shall be given to the directors. The directors may waive short notice.

Article 88 *inter alia* provides that questions arising at meetings of the board shall be decided by the majority votes of the members present.

Article 90 provides that a resolution in writing signed by a majority of the directors present in Malaysia entitled to receive notice of a meeting of the directors, shall be as valid and effectual as if it had been resolved at the meeting of the directors duly convened and held.

On 2 May 1991 the fourth defendant company had 3 directors who were the plaintiff, the first defendant and one Abas bin Adam. By a purported Art. 90 resolution dated 2 May 1991 signed by the first defendant and Abas bin Adam, the third defendant, Chuah Teik Huat, was purported to be appointed a member of the board of directors of the fourth defendant. (Presumably) thereafter by another Art. 90 resolution also of 2 May 1991 signed by the first defendant, Abas bin Adam and the third defendant, the second defendant, Dato' Jaafar bin Ahmad Indot was purported to be appointed a director of the fourth defendant. And presumably thereafter, by an undated Art. 90 resolution signed by the first, second and third defendants and Abas bin Adam, the transfer of certain shares of the fourth defendant from the first defendant to the second and third defendants was approved, 51000 shares in favour of the second defendant and 4000 shares in favour of the third defendant.

I pause to note that the resolution may have contravened Art. 81 which imposes certain restrictions in voting by a director in respect of matters in which he has an interest.

By a letter dated 22 July 1991 by the first, second and third defendants, the directors of the fourth defendant were required to convene an extraordinary general meeting (EGM) of the fourth defendant to "adopt" a resolution to have the plaintiff removed as a director of the

company. This was followed by yet another purported Art. 90 resolution dated 12 July 1991 signed by the first, second and third defendants and Abas bin Adam resolving that the said EGM required to be called for, be convened on 13 August 1991. This was circulated to all the directors including the plaintiff with the request to the plaintiff that he should also sign the document. He did not. The meeting was held. It was chaired by the second defendant. The shareholders present at the EGM other than the chairman were the first and third defendants and it was resolved that the plaintiff be removed from the board.

It turns out that although the plaintiff had at all relevant times been a member of the board, none of the above Art. 90 resolutions save the one dated 12 July 1991 were at relevant times, circulated to or otherwise brought to the plaintiff's attention or knowledge.

The short question for adjudication in this case is the validity of the Art. 90 resolutions signed by a majority of the directors but with all knowledge that there were these resolutions, kept away at all relevant times, from the plaintiff.

The directors are the primary organ of a company. They have powers conferred on them to manage the company. These powers are conferred upon the directors collectively as a board. *Prima facie*, they can be exercised only at a board meeting of which due notice has been given and at which a quorum is present. And although majority decision prevails, it is trite that a meeting of the majority without notice to the minority is ineffective - *Re Portuguese Copper Mines* [1889] 42 Ch. Div. 160; *Young v. Ladies Imperial Club* [1920] 2 KB 523. The exception to this, not relevant here, is that if all the directors are present and consciously made a decision, that decision will not be ineffective simply because formal notice was not given - *Swiss Screens (Australia) Pty. Ltd. v. Borgess* [1987] 11 ACLR 756, 758.

Article 90 which is one of the articles under the general heading "Proceedings of Directors", has to be read in the context of the principle that the powers conferred upon directors are conferred on them collectively as a board. In that context it is inconcievable that notice of an intended resolution of the directors need not be given to every member of the board. If upon the majority signing such a resolution it is not necessary to pass it on to the others who are present in the country there could be a situation of a company being managed, not by the board, but by a clique, no doubt consisting of the majority of the board, using Art. 90 type of resolutions and leaving the minority completely in the dark as to what is happening in and to the company. It cannot then be said that the business of the company is managed by the directors (as provided by Art. 73).

In *Pulbrook v. Richmond Consolidated Mining company* [1878] 9 Ch. D. 610, 612, what Jessel M.R., said, in dealing with the case of a director who was improperly and without cause excluded from meetings of the board, is I think applicable to a director kept in the dark in respect of an Art. 90 resolution. He said,

> He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.

In my judgment to make Art. 73 meaningful and to give effect to the collective responsibility of the board, although all that is required for an effective Art. 90 resolution is that it be signed by the majority, it must be taken as implied that every member of the board has to

have the resolution circulated to him or her before it can be accepted as a directors' resolution. Which is why in board room parlance, an Art. 90 type of resolution is usually referred to as a circular resolution. Each of the said resolutions, notice of which was not given to the plaintiff, is, in my judgment, ineffective.

Article 89 reiterates s. 127 of the Companies Act 1965 to provide for the validity of acts of directors notwithstanding that it is afterwards discovered that there was some defect in the appointment of any such director. In *Morris v. Kanssen & Ors.* [1946] 1 All ER 586, 590 Lord Simonds expressing the opinion of the House of Lords in respect of an Article equivalent to the said Art. 89 said:

> There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment, and (b) no appointment at all. In the first case, it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose: in the second case, there is not a defect; there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director.

In my judgment Art. 89 and s. 127 have no relevance in respect of the said ineffective Art. 90 resolutions the subject of this case in that as the resolutions were ineffective the purported appointment of the second and third defendants as directors were no appointments. This is not a case of some defect in their appointments. In effect they were never appointed. There was no appointment *ab initio*.

Accordingly it was declared that the appointment of the second and third defendants as directors of the fourth defendant was null and void and the consequential and other orders sought were given.